(21,863.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 146.

ALCIDES ARAN AND FRANCIS H. DEXTER, PLAINTIFFS IN ERROR,

vs.

CAMILO ZURRIÑACH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

INDEX.

	Original.	Print
Caption	1	1
Complaint	1	1
Summons	3	2
Demurrer of Aran	5	4
Demurrer of Dexter	5	4
Hearing and submission on demurrers	6	5
Demurrers overruled, &c	7	6
Answer	7	6
Motion to quash jury panel	8	6
Judgment	9	7
Hearing and submission on motion for writ of error	10	8
Order amending judgment	11	9
Order granting writ of error, &c	11	9
Order granting extension of time to file bill of exceptions	12	10
Memorandum of court's views on matter of writ of error	12	10

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	Original.	Print
Order granting leave to amend assignment of errors	14	11
Order approving bond, &c.	14	11
Petition for writ of error	15	12
Assignment of errors	15	12
Bond on writ of error	17	13
Præcipe for transcript of record	19	15
Bill of exceptions	20	15
Motion to quash jury panel	20	15
Plaintiff's Exhibit A—Supplementary report of receiver in case of Will *et al. vs.* Tornabells & Co. *et al.*	22	17
B—Contract of Zurriñach & Dexter & Aran, November 20, 1907	25	18
Testimony of Camilo Zurriñach	26	18
Alcides Aran	27	19
Martin Anglero	30	22
Tomas C. Vera	31	23
Testimony of plaintiff in rebuttal	32	24
Instruction to jury	33	25
Verdict	33	25
Order amending judgment	33	25
Judge's certificate to bill of exceptions	34	25
Clerk's certificate to transcript of record	35	26
Writ of error (original)	36	26
Certified copy of writ of error	38	27
Citation	40	28
Acceptance of service of citation	40	28

1 In the District Court of the United States for Porto-Rico.

At a Special Term of the District Court of the United States for Porto-Rico, within and for the District Aforesaid, begun and held at the Court-rooms of said Court, in the City of Mayaguez, on the Second Monday of July, being the Twelfth day of that month, in the Year of Our Lord One Thousand Nine Hundred and Nine, and of the Independence of the United States of America the One Hundred and Thirty-Fourth.

Present: The Honorable Bernard S. Rodey, Judge.

Among the proceedings had was the rendition of a judgment in the following cause, to wit:

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

Be it remembered that heretofore, to wit, the 11th day of November, 1908, came the plaintiff by his Attorney and filed his complaint in this cause, which said complaint is as follows, to wit:

Complaint.

#211.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

The plaintiff complaining of the defendants, alleges:

I.

That the plaintiff is a subject of the King of Spain, residing in the Municipality of Mayaguez, Porto-Rico, and the defendant Alcides Aran, is a citizen of the Republic of France, residing also in the Municipality of Mayaguez, Porto-Rico, and F. H. Dexter, the other defendant, is a citizen of the United States, residing in the Municipality of San Juan, Porto-Rico.

II.

2 That on the Twentieth day of November, Nineteen Hundred and seven, the above named defendants and this plaintiff entered into a certain agreement, in writing in the Spanish language, the following being a copy of a true and correct translation thereof:

"In the District Court of the United States for Porto-Rico.

At San Juan de Puerto-Rico, on this 20th day of November, 1907, Camilo Zurriñach, party of the first part, and F. H. Dexter, and Alcides Aran, parties of the second part, do agree and stipulate, and bind themselves as follows:

In consideration of Mr. Zurriñach's consenting to the entering by the Federal Court of a decree adjudging that the responsibilities and liabilities of Alcides Aran have ceased as Receiver in the case of Will vs. Tornabells, decided by the said Court, Mr. Aran engages himself:

1. To immediately pay all taxes due and unpaid, on the "Verémos" plantation.

2. To deliver to Mr. Zurriñach, the coffee product of the "Collera" and "Porvenir" plantations, until Mr. Zurriñach is fully paid for the sum now appearing in the Aran's report, and now owing to Zurriñach.

3. Mr. F. H. Dexter hereby guarantees the full compliance with this agreement.

(Sgd.) CAMILO ZURRIÑACH.
(Sgd.) ALCIDES ARAN.
(Sgd.) F. H. DEXTER.

III.

That the plaintiff afterwards fully and duly complied with all the conditions of said contract, on his part, and that on the said 20th day of November, 1907, the plaintiff was entitled to have and receive from said defendants a large sum of money, to wit; the sum of One Thousand Five Hundred and Sixty-Five Dollars Seventy-Two cents, together with the sum of Ninety Three dollars, Ninety four cents, interest thereon, at six per cent per annum from
3 the said date to the filing of this complaint.

IV.

That the defendants have wholly failed to perform said contract, or any part thereof, on their parts, and have not paid the same, nor any part thereof.

Wherefore, the plaintiff demands the judgment of this Court, for the sum of One Thousand Six hundred and Fifty Nine Dollars and Sixty-Six cents, with the costs of this suit.

(Signed) LEOPOLDO FELIU,
Attorney for Plaintiff.

And on the same day last aforesaid, to wit, the 11th of November, 1908, there was issued from the Clerk's office of the said Court a Writ of Summons, in the words and figures following, to wit:

Summons.

In the District Court of the United States for Porto-Rico.

No. 211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

The President of the United States of America to Alcides Aran and Francis H. Dexter, Greeting:

You are hereby notified that there has been filed in the Clerk's office of the District Court of the United States for Porto-Rico, a certain complaint by the above named plaintiff against you in which plaintiff alleges that on the 20th day of November 1907, both defendants and plaintiff entered into a contract, in writing, by which defendant Aran bound himself to pay all taxes due and unpaid on the coffee plantation "Verémos" and to deliver to plaintiff herein all the coffee gathered in the plantations "Collera" and "Porvenir" till Plaintiff Zurriñach should be fully paid for the sum
4 now appearing in the Aran's report, and now owing to Zurriñach, and defendant Dexter entered as guarantor and signed the said contract. That as consideration thereof plaintiff agreed to the entering of a decree in the Federal Court adjudging that the responsibility of defendant Aran had ceased as receiver in the case of Tornabells. That though plaintiff had carried out his part of said contract, defendants have failed to do so and therefore plaintiff brings this suit for $1,659.66 together with the costs thereof.

You are hereby required to appear and answer said complaint within ten (10) days from the date of the service thereof, otherwise the plaintiff will take judgment for the sum demanded in the complaint, to wit, $1,659.66 and costs.

Witness the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto-Rico, and the Seal thereof at Mayaguez, this 11th day of November, 1908, and in the 133rd year of the Independence of the United States of America,

[Seal of the United States District Court for Porto-Rico.]

JOHN L. GAY, *Clerk*,
By RICARDO NADAL, *Deputy*.

Marshal's Return on Summons.

Filed November 13th, 1909.

THE UNITED STATES OF AMERICA,
The District of Porto-Rico, ss:

I hereby certify and return that I have served the annexed Writ on the therein-named Francis H. Dexter by handing to and leaving

a true and correct copy thereof together with copy of complaint with him personally at San Juan, P. R., in said District on the 12th day of November A. D. 1908.

(Sgd.) H. S. HUBBARD,
U. S. Marshal,
By P. ENGLISH, *Deputy.*

UNITED STATES OF AMERICA,
District of Porto-Rico, ss:

I hereby certify and return that I have served the annexed
5 writ of Summons on the therein-named Alcides Aran by handing to and leaving a true and correct copy thereof with Alcides Aran personally at Mayaguez in said District on the 11th day of November, A. D. 1908.

(Sgd.) H. S. HUBBARD,
U. S. Marshal,
By RALEIGH F. HAYDON, *Deputy.*

Separate Demurrer of Alcides Aran.

Filed November 21st, 1908.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN et al.

For demurrer to the complaint herein, defendant Alcides Aran says that plaintiff ought not to recover herein for the reason that the complaint herein does not set forth a cause of action against him. Wherefore, he prays that said Complaint be dismissed, with costs to him.

(Sgd.) F. H. DEXTER,
Attorney for Defendant Aran.

Separate Demurrer of Defendant Dexter.

Filed November 21st, 1909.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN et al.

Defendant Francis H. Dexter, for his separate demurrer to the complaint herein says:

First. The said complaint and alleged contract set forth therein do not constitute a cause of action against this defendant.

Second. The said complaint and contract fails to set forth
6 any consideration for the alleged guaranty of this defendant.

Third. The said complaint fails to show that plaintiff has exhausted his remedies by judgment and execution against the de-

fendant, the principal debtor, before proceeding against this defendant as guarantor.

Fourth. Because the said complaint proceeds as upon a liquidated liability, whereas, if any liability, in fact and law exhists, upon the part of this defendant, it is only to such extent and for such amount that plaintiff has been damaged, and the complaint fails to set out the *the* extent to which plaintiff has been damaged on account of failure to receive the coffee, and the non-payment of taxes respectively. Wherefore, this defendant prays for judgment and that the complaint be dismissed with his costs.

(Sgd.) F. H. DEXTER, *Pro Se.*

Journal Entry.

July 12th, 1909.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

Mr. Benjamin H. Horton enters his appearance as Attorney for Francis H. Dexter, one of defendants herein. The separate demurrers herein are called for argument, Mr. Horton and Mr. Dexter in support of said demurrers, and Leopoldo Feliu, Plaintiff's Attorney in opposition thereto. The Court not being fully advised, Mr. Dexter promises to file by to-morrow morning a brief and case is submitted on Demurrers.

Journal Entry.

July 17th, 1909.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

7 Comes now F. H. Dexter and files his brief on the Demurrer herein, which demurrer was heretofore heard and submitted. The Court hears further argument of counsel and at the end thereof overrules the demurrer. Counsel for the Defendant is thereupon directed to file an answer and the trial of the cause is set for Monday July 19th, 1909.

Separate Answer of Defendants.

Filed July 19th, 1909.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN et al.

The defendants, by their Attorney, Benjamin J. Horton, for their separate answer to the plaintiff's complaint herein filed, say:

I.

That they admit the signing of the agreement set forth in the said complaint, but deni*e* every other allegation in said complaint contained, and particularly that the plaintiff on the twentieth day of November, 1907, or at any other time since that date, was entitled to receive from these defendants the sum of money mentioned in the said complaint, or any other sum of money, and defendants further deni*e* that the plaintiff has been damaged or has suffered in any amount whatsoever as set forth in the said complaint.

II.

For a separate and further defence, defendants say that on the — day of December, 1907, the plaintiff released and discharged def-. Aran and Dexter from all liability for and on account of the agreement set forth in the said complaint by agreeing to substitute in place of the principal debtor Alcides Aran, Mateo Angleró.

III.

For a further defence, defendants say that the action, if any ex*h*isted in favor of plaintiff, has prescribed because of failure to bring the same within one year after the alleged indebtedness, to wit, November 20th, 1907.

Wherefore, defendants pray judgment in their behalf, with costs.

(Sgd.) BENJ. HORTON,
F. H. DEXTER,
Attorney- for Defendant-.

Motion to Quash Panel of Jury.

Filed July 19th, 1909.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN et al.

Defendants move the Court to quash the panel of the Jury drawn for service at this term for the reason that the said panel was not

drawn from a box containing the names of three hundred qualified jurors; and for the further reason that the present panel was not drawn and the names of the jurors constituting the same were not placed therein as required by the Act of Congress, to wit, Statutes at Large, Volume 21 page 43, in this to wit; that the Clerk of this Court, John L. Gay, is a member of the Democratic party of the United States, but is not a member of any political party of Porto-Rico or of the District, nor is he a registered voter in Porto-Rico.

The Jury Commissioner of this Court who together with the said Clerk, placed the names of jurors in the jury box is not a member of any political party of the United States and is not an American citizen, but is a member of the so called Republican party of Porto-Rico.

The principal or majority party in this district is and was at the time the names of jurors were placed in the said box and drawn therefrom by the said Clerk and Jury Commissioner the so called Unionist party. All to the prejudice of defendants.

(Sgd.) F. H. DEXTER, *Attorney.*

Francis H. Dexter, being duly sworn says that the facts
9 set forth are true to the best of his knowledge and belief.

(Sgd.) F. H. DEXTER.

Subscribed and sworn to before me this 19th day of July 1909.

JOHN L. GAY, *Clerk,*
By RICARDO NADAL, *Deputy.*

Trial and Judgment, Journal Entry.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

This cause comes on for trial, and comes also the plaintiff, Camilo Zurriñach, by his counsel, F. L. Cornwell, and L. Felíu, and comes also the defendants Alcides Aran and F. H. Dexter, represented by their counsel F. H. Dexter and B. J. Horton. Thereupon F. H. Dexter presents a Motion to quash the panel of the jury as same is now constituted. The Court permits the said Dexter to read his motion and being fully advised in the premises overrules the same. To which action of the Court counsel duly objects and excepts, and he is permitted to state his objections to the Stenographer. Thereupon the trial of the cause is proceeded with, a Jury is Called, that is to say: Gregorio Ledesma, H. T. Hillebrand, Carlos Martinez, Dávila, Alejandro Diaz Busquets, Salvador Nadal, J. C. Cabanillas, Carlos M. Lopez, J. A. McAllister, Rafael Delgado, Abraham Toro, José Blanch and E. J. Sanchez. Twelve good and lawful men chosen

from the body of the District of Porto-Rico, duly examined, sworn and empaneled to try the issues joined between the parties.

At the conclusion of plaintiff's case, Counsel for plaintiff moves that the Court direct a verdict in behalf of his client, and the Court being fully advised in the matter, dictates a verdict and has one of the jurors sign the same. Said verdict being in words and figures as follows: "We, the jury, by direction of the Court, find for the plaintiff and assess his damages, at the sum of $1,565.72.

J. A. McALLISTER, *Foreman.*"

10 Wherefore, it is Ordered and Adjudged, that the plaintiff, Camilo Zurriñach, do have and recover of and from the defendants Alcides Aran and F. H. Dexter, the sum of One Thousand Five Hundred and Sixty-five Dollars and Seventy-two Cents ($1,565.72) together with his costs in this behalf laid out and expended, to be taxed by the Clerk, and that he have execution therefor, first against Alcides Aran and if returned "Nulla Bona" then also against the said surety Dexter.

Journal Entry.

July 23rd, 1909.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

Comes now B. J. Horton of counsel for the defendants herein and presents for filing the following papers in the above entitled cause, to wit: Assignment of Errors, Writ of Error and copy of same, and Petition for Writ of Error. F. L. Cornwell, counsel for the plaintiff, appears in opposition to the granting of said Writ of Error, and the Court not being fully satisfied, orders that the same be marked as tendered, but not filed at this time.

Journal Entry.

July 28th, 1909.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

Now comes F. H. Dexter, of counsel for defendants in the above entitled cause, and calls the Petition for Writ of Error hereintofore "tendered", and argues at length in support thereof; F. L. Cornwell

for plaintiff, promises to file memorandum of authorities
11 against the granting of said Petition being obligatory upon the Court, and the matter is further taken under advisement.

Journal Entry.

July 30th, 1909.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

And now on this day, July 30th 1909, it appearing on the suggestion of F. L. Cornwell, Attorney for the plaintiff, Benjamin H. Horton Attorney for defendant Francis H. Dexter being present in Court, that the judgment entered in this cause on July 19th Instant, fails to grant the interest which the Court announced from the bench it would allow, and said Counsel moving in that regard, it is now Ordered and Adjudged that the plaintiff Camilo Zurriñach do have and recover of and from the defendants Alcides Aran and Francis H. Dexter, the sum of One Thousand Five Hundred Sixty-five dollars and Seventy-two Cents ($1,565.72) together with interest on said principal sum at the rate of six per cent per annum from May 21st. A. D., 1908, until paid, and also together with his costs in this behalf laid out and expended, to be taxed, and that he have execution therefor, first against Alcides Aran, and if returned "Nulla Bona" then also against the said surety Francis H. Dexter.

To which action of the Court in so amending said judgment, the said Defendant Dexter by his said Counsel then and there duly objected and excepted.

In the matter of defendants' petition for the allowance of Writ of Error, in the above entitled cause, the Court sends down a Memorandum for the files and in accordance therewith the Petition is hereby granted as of July 23rd, 1909, the date it was presented, but the Writ of Error will not be signed until a Bond within the time required by law, shall be given by the defendants, to be approved as required by law, in the sum of $2,250.00, and Execution will be stayed, and a complete transcript in the premises will be made
12 and forwarded to the Honorable the Supreme Court of the United States as required by law, and Citation will issue as is proper.

Journal Entry.

July 30th, 1909.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and FRANCIS H. DEXTER.

On motion of B. J. Horton, on behalf of Francis H. Dexter, one of defendants in above entitled cause, the Court for good cause shown, grants an extension of time for the filing of Bill of Exceptions herein, and same is ordered to be so filed within Sixty days from the date the Petition for Writ of Error was presented, that is to say, from the 23rd July 1909.

Memorandum of Court's Views on Matter of Writ of Error.

Filed July 30th, 1909.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and FRANCIS H. DEXTER.

This matter is now before us on the petition of the defendants for a writ of error herein. The issuance of the writ is strenuously objected to on behalf of plaintiff, on the ground that the suing out of the writ is manifestly frivolous because the amount involved in the suit is less than two thousand dollars and there is no federal question under the constitution or laws of the United States involved.

We are constrained to agree with the contention that there is no real merit in the petition for this writ of error.

It is based upon the allegation made in a motion filed at the moment of the trial that the jury was not drawn in accordance
13 with law, in that the requisite number of names of qualified jurors was not in the box from which the names of the jury were drawn, and that the Clerk of the Court and the Jury Commissioner did not belong to the proper political parties. The Court has personal knowledge that the names of the requisite number of jurors were in fact in the box when the names were drawn thereform in open Court in the presence of the Clerk, the Jury Commissioner, the Court itself, the Marshal, and many members of the bar; all of which is set out in the record thereof made at the time. The Court is also aware, having investigated the matter, that the politics of both the Clerk and the Jury Commissioner are strictly legal under the law governing the drawing of juries in this Court in this Island, and has had several juries drawn by the same persons after due deliberation as to their qualifications in the premises. Therefore the Court did

not choose to waste its time hearing Counsel or listening to any testimony he might offer in that regard. In any event, and while insisting that the partisanship of such officers was as required by law, the Court is of opinion, that, in a jurisdiction such as Porto-Rico is, where neither of the national political parties exists as such, a compliance with the national act in that regard is not necessary as matter of law, and that all that is necessary is an honest selection of qualified jurors from a box containing the requisite number of names, which was done, and of which the Court has personal knowledge and takes judicial notice.

However, the matter of the right of petitioner to sue out this writ of error is stare decisis in this Court in favor of the right. See our Opinion in Ventura Munich vs. Ramon Valdés in the San Juan District, to be published in 4 P. R. Fed. Reps.

Therefore the petition will be granted as of date July 23, 1909, when the same was presented, on the giving of a bond within the time required by law, by the defendants, to be approved as required by law, in the sum of $2,250.00 and execution will be stayed, and a complete transcript in the premises will be made and forwarded to the Honorable the Supreme Court of the United States as
14 required by law, and Citation will issue as is proper.

(Sgd.) B. S. RODEY, *Judge.*

San Juan Journal Entry.

August 3rd, 1909.

No. 211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

Upon motion of F. H. Dexter of counsel for the defendants, he is permitted to erase lines No-. 7, 8 and 9 in paragraph I of the assignment of errors heretofore tendered by him in the above entitled cause.

San Juan Journal Entry. Bond Approved.

At Chambers, August 17th, 1909.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN et al.

It appearing that the petition for a writ of error in the above entitled cause was allowed by the Court on the 23rd day of July last, and it further appearing that the writ of error and assignment of

errors were accepted and marked as tendered only on the same date, but that the signing of the said Writ of error was deferred until a proper bond in the premises should be presented and approved,

Now, on this day comes F. H. Dexter in his own behalf and representing Alcides Aran the co-defendant herein, and presents a supersedeas bond under the writ of error, and N. B. K. Pettingill, of counsel for the plaintiff, being present and not objecting thereto but admitting the sufficiency of the same, the Court signs and approves said bond and also the writ of error, and Citation is ordered to issue in the premises nunc pro tunc as of date July 23, 1909.

15 *Petition for Writ of Error.*

Filed August 13th, 1909, Nunc pro tunc as of July 23rd, 1909.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN et al.

Now comes Alcides Aran and Francis H. Dexter, defendants herein and say:

That on the 19th day of July 1909 the District — of the United States for Porto-Rico entered a judgment herein in favor of the plaintiff and against these defendants in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of these defendants, all of which will more in detail appear from the Assignment of Errors which is filed with this petition. Wherefore these defendants pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and a transcript of the record proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

(Sgd.) F. H. DEXTER,
Attorney for Defendants.

Filed August 13th, 1909, Nunc pro tunc as of July 23rd, 1909.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN et al.

Defendants in the above entitled cause Alcides Aran and Francis H. Dexter assign as errors committed by the Court in the trial of the above entitled cause the following:

First, the Court erred in usurping the functions of the jury and deciding questions of both law and fact involved in this case upon the opening of the case without hearing any testimony whatsoever.

16 2nd. The Court erred in refusing to permit defendants to show by competent evidence the impossibility of perform-

ance of the condition of the bond sued on, to wit: the delivery of the coffee from the properties mentioned in said bond.

3rd. The Court in improperly construing the law and charging the jury that defendants were absolutely bound to pay the amount sued on to plaintiff regardless of the condition in the bond, to deliver the coffee as stated therein.

4th. The Court erred in peremptorily directing the Jury to return a verdict for the plaintiff.

5th. The Court erred in making remarks to the Jury to the effect that defendants had no defense to the action.

The Court erred in arbitrarily refusing defendants an opportunity to offer evidence in support of their motion to quash the panel of the Jury and in overruling said Motion.

6th. The Court erred in striking out the testimony of competent witnesses showing that plaintiff had accepted the obligation and agreement of the witness to deliver coffee in the place and stead of the defendant Aran.

7th. The Court erred in striking out the testimony offered by defendants showing the suits of Francisca Aran in her endeavors to retain the properties "Collera" and "Porvenir" as against certain mortgage creditors who sought to foreclose mortgages thereon, together with the decrees of this Court against the contention of the said Francisca Aran.

8th. The Court erred in striking out the evidence of the mortgage foreclosure proceedings carried on in the District Court of Mayaguez by the mortgage creditors Banco Soller and the American Trading Company and the decrees of said Court foreclosing the said mortgages on the estate Collera and Porvenir.

9th. Because the Court erred in denying to defendants the right to have a proper jury as provided by the Acts of Congress and particularly Statutes at large Volume 21 page 43 and in pre-
17 venting them from showing that the jury box from which the jury was drawn does not contain the names of three hundred qualified jurors and that their names were not placed therein or drawn regularly as required by said law.

Wherefore these defendants pray that the said judgment be reversed.

(Sgd.) F. H. DEXTER,
Attorney for Defendants.

Bond on Writ of Error.

Filed August 13th, 1909, As of July 23, 1909.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN, FRANCIS H. DEXTER.

Know all men by these presents, that we, Alcides Aran and Francis H. Dexter, as principals, and J. T. Silva and Company, S. en C. and W. F. Lippitt, as sureties, are held and firmly bound unto Camilo

Zurriñach, Plaintiff above named, in the sum of Twenty Two Hundred and Fifty Dollars ($2,250.00), to be paid to the said Camilo Zurriñach, his executors, or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our, successors, representatives and assigns firmly by these presents.

Whereas, the above named defendants, Alcides Aran and Francis H. Dexter, have sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled case by the District Court of the United States for Porto Rico.

Now therefore, the condition of this obligation is such that if the above named Alcides Aran and Francis H. Dexter, shall prosecute said Writ to effect and answer all costs and damages if they
18 shall fail to make good their plea, then this obligation shall be void, otherwise shall remain in full force and effect.

[SEAL.] ALCIDES ARAN,
By F. H. DEXTER,
Agent and Attorney.

[SEAL.] J. T. SILVA & CO., *S. C.*

FRANCIS H. DEXTER.
W. F. LIPPIT.

With my consent as partner of said J. T. Silva & Co. S. en C.
JORGE SILVA.

No. 10.

UNITED STATES OF AMERICA,
Porto Rico, ss:

José Silva y Sapia being duly sworn upon his oath says that he is manager and partner of the limited co-partnership J. T. Silva and Company, S. en C. which is engaged in business in Porto Rico, in accordance with the laws thereof, and that said J. T. Silva and Company S. en C. is worth more than the sum of Twenty Two Hundred and Fifty Dollars, over and above all liabilities and exemptions.

JOSÉ T. SILVA.

Subscribed and sworn to before me this 13th day of August 1909, by José Silva, who personally appeared before me and whom I know.

[NOTARIAL SEAL.] C. COLL CUCHI,
Notary Public.

No. 11.

UNITED STATES OF AMERICA,
Porto Rico, ss:

W. F. Lippitt, being duly sworn, upon his oath says that he is a resident of Porto Rico and owns real estate therein more than the value of Twenty Two Hundred and Fifty Dollars in excess of all li-bilities and exemptions.

W. F. LIPPITT.

Subscribed and sworn to before me this 13th day of August, 1909, by W. F. Lippitt, who personally appeared before me and whom I personally know.

[NOTARIAL SEAL.] C. COLL CUCHI,
Notary Public.

19 The foregoing bond being satisfactory to counsel (Judge Pettingill) as he admits, the same is on this Aug. 13, 1909, received, and accepted and approved as sufficient in substance and form and ordered to the files as of July 23rd, when the other bond was tendered.

B. S. RODEY, *Judge.*

Præcipe for Transcript of Record.

Filed August 14th, 1909.

John L. Gay, Esq., Clerk U. S. District Court, San Juan.

DEAR SIR: Please prepare at your earliest opportunity a full and complete transcript of the record for the purpose of the Writ of error to the U. S. Supreme Court in the case of C. Zurriñach vs. Aran and myself.

I desire a carbon copy of this transcript for which I will pay the proper charges.

Respectfully, Yours,
(Sgd.) F. H. DEXTER.

20 In the District Court of the United States for Porto Rico,
Sitting at Mayaguez.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and FRANCIS H. DEXTER.

Bill of Exceptions.

Be it remembered that on the trial of this cause in the above-entitled Court, which took place in the City of Mayaguez, Porto Rico, on the 19th day of July, 1909, at a term thereof duly called and held, the Honorable Bernard S. Rodey, Judge, presiding,—the following proceedings were had, to wit:

At the opening of the trial Counsel for Defendants submitted the following motion:

"Defendants move the Court to quash the panel of the jury drawn " in service at this term, for the reason that the said panel was not " drawn from a box containing the names of 300-qualified jurors; and " for the further reason that the present panel was not drawn and " the names of the jurors constituting the same were not placed

" therein, as required by the Act of Congress—to wit, Statutes-at-
" Large, Volume 21, page 43, in this, to wit: that the Clerk of this
" Court, John L. Gay, is a member of the Democratic Party of the
" United States, but is not a member of any political party of Porto
" Rico, or of the District, nor is he a registered voter in Porto Rico.

"The Jury-Commissioner of this Court, who, together with the said
" Clerk, placed the names of the jurors in the jury-box, is not a mem-
" ber of any political party of the United States and is not an Ameri-
" can citizen, but is a member of the so-called Republican Party of
" Porto Rico.

"The principal or majority-party in this District is and was at the
" time the names of the jurors were placed in the said box and drawn
" therefrom by the said Clerk and Jury-Commissioner the so-called
" Unionist Party, all to the prejudice of Defendants.

"(Sgd.) F. H. DEXTER.

"F. H. Dexter, being duly sworn, says that the facts set forth are true to the best of his knowledge and belief.

"(Sgd.) F. H. DEXTER.

Subscribed and sworn to before me this 19th day of July, 1909.

—— ——.

21 The said motion having been by Defendants submitted to the Court, their Counsel stated that they desired to offer evidence in support of the same, and thereupon called John L. Gay, Esq., the Clerk of the Court, to the stand, to be sworn and give his testimony regarding the same.

Thereupon the Court refused permission to submit any evidence in support of said motion and over-ruled the same forthwith, stating that it had personal knowledge of the mode and manner in which the jury was drawn and the law with reference to the matter and regards the same as having been strictly in accordance with the law and does not regard the question in Porto Rico of the politics of the parties as being applicable to the same extent as it would be in the States. The motion is also denied on the ground that it was not filed within the time required by law and no 5-days' notice was given to the other party.

To this action of the Court Defendants, by their counsel, then and there objected and duly noted an exception.

Thereupon a jury was duly empannelled and sworn, and the Plaintiff, to sustain the issues upon his part, offered in evidence the Supplemental Report of Alcides Aran, Receiver, filed in this Court on November 20, 1907. There being no objection to the same, it was marked Exhibit "A" for Plaintiff and read to the jury. Said document is in words and figures, as follows:

22 EXHIBIT "A" FOR PLAINTIFF.

In the District Court of the United States for Porto Rico.

ALBERTO WILL et al.
vs.
J. TORNABELLS & Co. et al.

Supplementary Report of Receiver.

To the Hon. Bernard S. Rodey, Judge of the District Court of the U. S. for Porto Rico:

Your Receiver, the undersigned, Alcides Aran, respectfully represents that, in accordance with the orders of this Court, previously made, he appears for the purpose of finally closing up his account and obtaining a discharge.

He respectfully represents that, as appears by the order made and entered in the above-entitled cause on the 7th day of October, 1907, he incurred certain expenses in connection with the administration of the properties under his charge between the date of his previous report and the date of the actual transfer of said properties to the persons claiming to be owners of the same.

Your Receiver states, however, that these expenses were mostly in connection with the estate "Veremos", claimed by the Defendant, Camilo Zurriñach, but your Receiver has made an arrangement with the said Defendant, Camilo Zurriñach, claiming to own the said estate of "Veremos", by which he, the said Camilo Zurriñach, released your Receiver from all liabilities on account of the administration of the said property "Veremos" and particularly for the amount of $1,565.77, which, according to his previous report, corresponds to the said Hacienda "Veremos" as a balance due it on account of the coffee collected therefrom.

23 Your Receiver says that no money has been collected by him, or any property received by him, since the date of filing his last report, and that there are no debts or claims of any kind outstanding from creditors, claimants or any persons whatsoever.

Respectfully submitted:

(Signed) ALCIDES ARAN.

Alcides Aran, being duly sworn, upon his oath says that the facts set forth above are true.

ALCIDES ARAN.

Subscribed and sworn to before me this 20th day of November, 1907.

(Signed) H. H. SCOVILLE, *Clerk.*

24 Thereupon Counsel for Plaintiff offered the contract or bond sued-upon, which was marked Exhibit "B" for Plaintiff

and read to the jury. The said document is in words and figures, as follows:

25 EXHIBIT "B" FOR PLAINTIFF.

(*Translation.*)

In the District Court of the United States for Porto Rico.

In San Juan, Porto Rico, this 20th day of November, 1907, an agreement is hereby entered into between Camilo Zurriñach, Party of the First Part, and F. H. Dexter and Alcides Aran, Parties of the Second Part, witnesseth:

In consideration of Mr. Zurriñach's consenting to a decision of this Court declaring his, Alcides Aran's, responsibilities as Receiver, duly appointed in the case of Will vs. Tornabells, which case has been duly decided, to have ceased, the said Aran duly obligates himself, as follows:

(1) Immediately to pay all taxes that may be pending payment on the "Veremos" estate.

(2) To deliver to the said Zurriñach the coffee produced on the estates "Collera" and "Porvenir" until the receipt of balance due the said Zurriñach and a receipt from the latter in full discharge of the sum that, according to the report of the said Aran, is due to the said Zurriñach.

(3) Mr. F. H. Dexter guarantees, in every respect, the fulfillment of the foregoing contract.

(Signed) CAMILO ZURRIÑACH.
ALCIDES ARAN.
F. H. DEXTER.

UNITED STATES OF AMERICA,
District of Porto Rico:

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, hereby certify the foregoing to be a true and correct copy of a certain document attached to the Receiver's report in the Will vs. Tornabells case in this Court.

Witness my hand and seal this 17th day of April, A. D. 1908.

(Signed) JOHN L. GAY,
Clerk of the District Court of the U. S. for Porto Rico.

26 Thereupon the Plaintiff, CAMILO ZURRIÑACH, testified that no taxes were paid on the plantation "Veremos", in accordance with the said agreement, and that no coffee was delivered to him by the Defendants, in pursuance thereof. He testified that Defendant Aran owed him $1,565.72, and that no part of the same has been paid to him, either by the said Aran or by the Defendant Dexter.

Upon cross-examination the following proceedings were had:

Q. Were there any taxes due upon the plantation "Veremos" at the time Mr. Aran took possession of it as Receiver?

Mr. CORNWELL: I object to that. The Receiver's Report is the best evidence; that shows the amount then due.

The COURT: Why isn't that right, Mr. Dexter?

Mr. DEXTER: That shows the amount of coffee to be delivered.

The COURT: Let me see that paper.

Exhibit "A" for the Plaintiff, which is the Receiver's report, is handed to the Court and the Court reads same aloud.

The COURT: How can you defend against this, Mr. Dexter?

Mr. DEXTER: Defend against what?

The COURT: Against this sum of $1,565.72. Let me see the contract.

Exhibit "B" for the Plaintiff, which is the contract between the Plaintiff and the Defendants, is handed to the Court and the Court reads same aloud.

The COURT: He having sworn that there was neither money nor coffee given him, how can you go any further?

Mr. DEXTER: That bond is an absolute bond for the payment of the taxes due, but the second part of it as to the coffee was not an absolute outright obligation, but was dependent upon the delivery of the coffee, and if we can show any good reason why we did not deliver the coffee, that is a good defense. I am defending here simply to show an impossibility of the performance of the provisions of that 2nd Clause. This is not an outright bond to pay a certain sum, but to do a certain thing. Mr. Zurriñach was willing to take his chances to get the money out of the coffee. We all thought there would be coffee.

The COURT: No, Mr. Dexter, that is absolute. You must make an absolute defense for yourself. Reform your instrument or judgment will go against you. Write out a verdict.

Mr. DEXTER: Your Honor is not going to allow me to make a defense?

The COURT: If you want to cross-examine him as to whether he received any pay or not.

Mr. DEXTER: I shall proceed along the lines that I regard as proper procedure. I will offer my evidence as I see fit, and Your Honor may rule upon it. How does Your Honor rule upon this question?

The COURT: The objection to the question is sustained under the contract, and Defendant excepts. Is that the Plaintiff's case?

27 Mr. CORNWELL: Yes, sir.

The COURT: Proceed, Mr. Dexter.

Thereupon Defendants, to sustain the issues upon their part, offered the following testimony:

Defendant ALCIDES ARAN, being sworn, the following proceedings were had:

Direct examination by Mr. DEXTER:

Q. State your name?
A. Alcides Aran.
Q. Age, residence and occupation?
A. 46-years of age; farmer.
Q. You were the Receiver appointed by this Court over certain properties in the case of Alberto Will, et al., vs. J. Tornabell & Company, et al., were you not?
A. Yes-sir, I was.
Q. (Handing the witness Exhibit "B" for the Plaintiff.) Do you remember this agreement, which was executed by you, which I guaranteed, in favor of Mr. Zurriñach, on the 20th of November, 1907?
A. I do.
Q. What did that amount of $1,565.72 contained in your Supplemental Report represent.

Mr. CORNWELL: I object to that; the report is the best evidence of what it is.

A. For the profits of that crop of the estate "Veremos".

Mr. CORNWELL: That is objected to, because the best evidence of the balance due is the report of the Receiver.
Mr. DEXTER: What I am trying to show is that this amount is for the amount of coffee and does not include the taxes.

Q. Did you turn over to Mr. Zurriñach the coffee from the fincas "Collera" and "Porvenir" after the signing of this contract sued-on?
A. I did not.
Q. Why didn't you?

Mr. CORNWELL: I object to that. He says he did not. That ends his case.
The COURT: That is true. You should have an affirmative suit here.
Mr. DEXTER: To show a release?
The COURT: If you expect to show a release that is different.
Mr. DEXTER: If Your Honor will give me an opportunity I will put in my defense.
28 The COURT: I will let him put in his defense. I want to see what is in it.

Mr. DEXTER: Answer that question.
A. Because I did not continue as Receiver or administering those properties?
Q. When did you separate from the management of those properties?
A. About October or November, when the Judge accepted my accounts and relieved me as Receiver.

Mr. CORNWELL: I think that is all immaterial. He says he didn't continue there.

The COURT: There isn't any use Mr. Dexter. This man could never get his release unless he showed me that receipt. You are clearly liable Mr. Dexter. You haven't a foot of ground to stand on.

Mr. DEXTER: Your Honor hasn't any right to make a statement of that kind before the jury.

The COURT: I will take it back if you show me that I am wrong.

Mr. DEXTER: That is what I am trying to do, if Your Honor will give me an opportunity. I am going to offer evidence to show that it was beyond our power to do it.

Mr. CORNWELL: Your Honor has ruled against that.

Mr. DEXTER: The next defense is that this man was substituted as Administrator by Anglero.

The COURT: Proceed. I will take care of the case and instruct the jury if he does not make out a case.

Q. After you severed your connection with these fincas did you have any conversation with Mr. Zurriñach about the delivery of this coffee?

A. Yes-sir.

Q. What was it, and when?

Mr. CORNWELL: For the purposes of the record, I want to object, because an oral agreement cannot vary a written one.

Q. Where and when was that?

A. I don't remember the exact date. When I ceased the management of those properties I called upon Mr. Zurriñach, about 15 or 20 days afterwards, and while Mr. Zurriñach was in the warehouse preparing some straw for hats, I addressed him in the following words: I told him, the agreement signed by Mr. Dexter and me in San Juan in your favor, I cannot comply with it this year, because I have been unable to come to any agreement with my sister, the widow of Luis Aran, and she has placed another Administrator or Manager upon those properties, called Martin Anglero, and he would be the one who will turn over the coffee to you. The gentleman answered me: That is all right; the only thing I want is to be paid.

Q. Did you have any other or further conversation with him upon the subject?

A. Some time afterwards; I don't remember the date, but during the gathering of the coffee crop he told me that that account
29 had not been settled, and then I answered him: You have to collect from Martin Anglero, who is the Manager of those properties, since I am no more the Manager of the same.

Q. Do you know whether Anglero received instructions from you and from Doña Francisca Aran, the Administratrix, to turn over this coffee to Mr. Zurriñach?

Mr. CORNWELL: I object to that, and move to strike out the testimony already given.

The COURT: The motion is sustained.

Mr. DEXTER: Your Honor will not put me out of Court without an opportunity to present my defense.

The COURT: You have absolutely no defense. The motion is sus-

tained, as he cannot in that way vary the terms of this written instrument.

Mr. DEXTER: I want to have the record show that this witness was offered for the purpose.

The COURT: I will hold you down to your own rule. Ask the questions and I will rule on them.

Q. (The last question was read by the stenographer.)

Mr. CORNWELL: It is objected to on the ground that it is immaterial if they did not turn it over.

A. Yes-sir, he received them.

Q. Do you know why the coffee was not turned over from the fincas "Collera" and "Porvenir" to Mr. Zurriñach?

A. When Mr. Zurriñach complained to me during the gathering of the coffee crop that the same had not been turned over to him, I inquired from Mr. Anglero, who replied to me that the products of those two coffee plantations did not cover the refracción expenses, and that the-e was a loss.

Mr. CORNWELL: I object to that as hearsay.

Q. In this conversation that you had with Mr. Zurriñach did he say anything about holding you liable or releasing you from that obligation?

Mr. CORNWELL: I object to that as leading.

The COURT: It is leading.

Q. What did Mr. Zurriñach say to you in that first conversation when you told him that you were leaving the fincas and that the new man, Anglero, would be in charge?

A. What I said. He said: provided they pay me it is all right.

Mr. DEXTER: That is all.

Mr. CORNWELL: No cross-examination. Now I move to strike it out.

The COURT: Unless it is connected, I will strike it out. It is no defense to this suit so far.

30 Thereupon Defendants, to further support the issues on their part, offered the witness MARTIN ANGLERO, who, being duly sworn, testified, as follows, and the following proceedings took place:

Direct examination by Mr. DEXTER:

Q. State your name.

A. Martin Anglero.

Q. And age, residence and occupation.

A. Thirty-one years of age; farmer.

Q. Where do you live?

A. In Las Marias.

Q. Did you have anything to do with the Haciendas "Collera" and "Porvenir" in 1907?

A. On the 7th of July, 1907, I took charge of those properties at the request of Mrs. Aran.

Q. Did this lady give you any instructions to turn any coffee over to Mr. Zurriñach?

Mr. CORNWELL: I object to that.

The COURT: He may show that he did turn it over; let me see.

A. She didn't give me any instructions to turn over any coffee to him. She told me to make the greatest economies so that with the balance obtained he could be paid.

Q. Did you turn over any coffee from those estates to Mr. Zurriñach?

A. No, sir.

Q. Why not?

A. Because the coffee produced that year did not cover refracción expenses of the property.

Q. How long did you stay in charge of those two properties?

A. Since July 8, 1907, up to February 28, 1908.

Q. Why did you leave?

A. On account of the foreclosure proceedings instituted by the American Trading Company.

Mr. DEXTER: That is all.

Mr. CORNWELL: Now I move to strike it out.

The COURT: It may be connected yet. It will be stricken out if not connected.

Mr. CORNWELL: No cross-examination.

Witness retires.

31 Thereupon the following further proceedings took place:

Mr. DEXTER: Defendants now offer in evidence the records of this Court in Case 481, San Juan, being the case of Francisca Aran y Aran vs. The Banco Soller, and the judgment of the Court rendered thereupon against the Complainant April 18, 1908.

The COURT: What is the object, Mr. Dexter?

Mr. DEXTER: To show that we were making all the efforts we could to retain the property and to be able to comply with this bond; to retain the properties, and, therefore, retain the crops, but as the properties were foreclosed, we were deprived of the crops.

The COURT: You ought to have an affirmative suit in here.

Mr. DEXTER: I don't think so, Your Honor.

Mr. CORNWELL: It is objected to on the ground that it is absolutely immaterial in this suit.

The COURT: Sustained.

Mr. DEXTER: Take an exception.

Also the records of the Court in the case of Francisca Aran y Aran vs. Carmen Zurriñach, et al., being No. 486, and the judgment rendered thereupon denying the Complainant, Francisca Aran, the right, or refusing to annul the mortgage in favor of the American Trading Company and the Banco Soller.

Mr. CORNWELL: Objected to as immaterial.

The COURT: Sustained; wholly immaterial in this action.
Mr. DEXTER: Note an exception.

Thereafter Defendants, to sustain the issues upon their part, called to the Stand and had sworn TÉMAS C. VERA, the Clerk of the District Court of Mayaguez, and thereupon the following proceedings were had and taken:

Direct examination by Mr. DEXTER:

Q. Have you in your possession the papers in the suit of American Trading Company vs. Francisca Aran y Aran, and in the suit of Banco Soller vs. Francisca Aran y Aran, affecting the properties "Porvenir", "Collera" and "Veremos"?

A. Yes-sir.

32 Q. Will you refer to them and state when the judgment in these cases was rendered?

A. Which case?

Q. The Banco Soller?

Mr. CORNWELL: In order to save time, I object to them on the ground that they are immaterial.

The COURT: How is it material?

Mr. DEXTER: For the same reason that I stated before with regard to the other documents. I want to show by this witness that these properties "Porvenir" and "Collera" were foreclosed in the early part of 1908.

The COURT: You may fix the dates.

Q. Have you got the date of the decree?

A. Yes-sir.

Q. What is the date of the decree?

A. 27th of April, 1906.

Q. No, the decree of foreclosure?

A. November 2, 1908.

Q. Did that apply to the properties "Collera" and "Porvenir"?

A. Yes-sir.

Q. Now, in the case of the American Trading Company affecting the "Veremos", when was that judgment rendered, the judgment of foreclosure?

A. May 18, 1908.

Mr. DEXTER: That is all.

Mr. CORNWELL: No cross-examination.

Witness retires.

Mr. CORNWELL: I move to strike out this testimony.

The COURT: It is sustained.

Mr. DEXTER: Note an exception.

That is our case.

Thereupon the Plaintiff took the Stand in rebuttal and denied that he had the conversation with Alcides Aran to which the latter had testified.

Thereupon the following further proceedings were had and taken:

The COURT: Mr. Dexter, have you your record just as you want it in every way? I will say to you Mr. Dexter, that the Court has no feeling.

Mr. DEXTER: I am not expecting anything of that sort.

33 The COURT: No, and the Court wouldn't give it to you if you did. Under that paper it was your duty to either show payment of that money or show delivery of that coffee. None of the things that occur outside would be a defence to that, and you have made no defense and hence the jury will be instructed to return a verdict for the Plaintiff.

Mr. DEXTER: Note an exception.

Thereupon the jury, without leaving the box, signed the following verdict: "We, the jury, by direction of the Court, find for the Plaintiff and assess his damages at the sum of $1,565.72.

To the action of the Court, in his conduct and each and all of his rulings at the trial, as hereinabove set forth, and to the verdict of the jury as returned by it under the peremptory instructions of the Court, Defendants duly objected and noted their exception.

Thereafter, and on the 30th day of July, 1909, and at the same term of Court, but after the jury which tried the cause and which under the peremptory instructions of the Court had rendered a verdict in favor of Plaintiff, as hereinabove set forth, and after the judgment had been entered thereon, on the 19th of the said month, the Court made the following order:

"And now on this day, it appearing on the suggestion of Frederick L. Cornwell, attorney for Plaintiff—Benjamin J. Horton, attorney for Defendant Francis H. Dexter being present in Court—that the judgment entered in this cause on July 19th, instant, fails to grant the interest which the Court announced from the Bench it would allow, and said counsel moving in that regard, it is now ordered and adjudged: That said judgment be, and the same hereby is, corrected nunc pro tunc as of date of July 19, 1909, so as to read, as follows:

"Wherefore, it is ordered and adjudged that the Plaintiff, Camilo Zurriñach, do have and recover of and from the Defendants Alcides Aran and Francis H. Dexter the sum of $1,565.72, together with interest upon said principal sum at the rate of 6% per annum, from May 21, 1908, until paid, and also together with his costs in this behalf laid out and expended to be taxed, and that he have execution therefor: First—against Alcides Aran, and, if returned nulla

34 bona, then also against the said surety Francis H. Dexter"; to which action of the Court in so amending said judgment Defendant F. H. Dexter, by his said counsel, then and there duly excepted.

And, now, in furtherance of justice, and that right may be done the Defendants, they tender and present the foregoing as their Bill of Exceptions in this case to the action of the Court and pray that the same may be considered and allowed, and signed and sealed, by the Court, and made a part of the record; and the Court accordingly grants the said prayer and allows and signs this Bill of Exceptions.

August 27—1909.

(Sgd.) B. S. RODEY, *Judge.*

35 In the District Court of the United States for Porto-Rico.

#211. Law.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and F. H. DEXTER.

I, John L. Gay, Clerk of the District Court of the United States for Porto-Rico, do hereby certify the foregoing thirty-four type written pages, numbered from 1 to 34, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the Clerk of said Court, and that the same constitute the return to the annexed writ of error.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 9th day of September, A. D. 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for Porto-Rico,
By RICARDO NADAL,
Deputy Clerk, Mayaguez Division.

36 In the District Court of the United States for Porto Rico, Sitting at Mayaguez.

CAMILO SURRINAK
vs.
ALCIDES ARAN et al.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

To the Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you between Camilo Surrinak and Alcides Aran and Francis H. Dexter, Defendants, a manifest error hath happened to the great damage if the said Alcides Aran and Francis H. Dexter as by this complaint appears.

We, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you may have the same at the City of Washington within sixty days from this date in the Supreme Court, to be then and there held, that the *recod* record and proceedings aforesaid being inspected, the said Supreme Court shall cause to be done that which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13" day of Aug. 1909 as of date nunc pro tunc July 23d 1909.

[Seal United States District Court for the District of Porto Rico.]

JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.

Allowed:
B. S. RODEY,
Judge U. S. District Court for P. R.

37 [Endorsed:] #211. Camilo Surrinak vs. Alcides Aran et al. Writ of Error. Tendered on July 23, 1909. 8/13. Filed Clerk's Office, United States District Court. Aug. 13, 1909 nunc pro tunc as of July 23, 1909. D. John L. Gay, by C. A. Davidson, Deputy.

38 *Copy of Certified Copy of Writ of Error. Filed in Clerk's Office Aug.* 13/09.

In the District Court of the United States for Porto Rico Sitting at Mayaguez.

CAMILO SURRINAK
vs.
ALCIDES ARAN et al.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

To the Judge of the District Court of the United States for Porto Rico, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court before you between Camilo Surrinak and Alcides Aran and Francis H. Dexter, defendants, a manifest error hath happened to the great damage of the said Alcides Aran and Francis H. Dexter, as by this complaint appears.

We, being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington within sixty days from this date in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court shall cause to be done that which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice
39 of the United States, the 13th day of Aug. 1909 as of date nunc pro tunc July 23rd, 1909.

(Sig.) JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.

Allowed:
(Sig.) B. S. RODEY,
Judge U. S. District Court for P. R.

UNITED STATES OF AMERICA,
District of Porto Rico, ss:

I, John L. Gay, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing typewritten page to be a true and faithful copy of the writ of error allowed in the therein entitled cause on the 13th day of August, 1909, as of date nunc pro tunc July 23rd, 1909, as the same remains of record in the office of the Clerk of said Court.

[SEAL.] JOHN L. GAY,
Clerk District Court of the United States for Porto Rico.

This copy of "Certified Copy of Writ of Error" is sent by special request of attorney for appellant-.

40 In the District Court of the United States for Porto Rico.

CAMILO ZURRIÑACH
vs.
ALCIDES ARAN and FRANCIS H. DEXTER.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Camilo Zurriñach or Frederick L. Cornwell, His Attorney, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the City of Washington, at the next term thereof, pursuant to an order allowing a Writ of Error entered in the Clerk's Office of the District Court of the United States for Porto Rico in that certain action in which Camilo Zurriñach is Plaintiff and Alcides Aran and Francis H. Dexter are Defendants,

the latter being Plaintiffs-in-Error, to show cause, it any there be, why the judgment rendered against the said Defendants, as in this said order allowing the writ-of-error mentioned, should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Bernard S. Rodey, Judge of the District Court of the United States for Porto Rico, this 13 day of August, 1909, nunc pro tunc as of July 23d, 1909.

B. S. RODEY, *Judge.*

I hereby acknowledge service of the foregoing and a Receipt of a copy of the foregoing on this the 16th day of Aug. 1909.

F. L. CORNWELL,
Attorney for Appellee.

41 [Endorsed:] In the District Court of the United States for Porto Rico. Camilo Zurriñach vs. Alcides Aran, and Francis H. Dexter. Citation. 8/13. Clerk's office, United States district court. Filed Aug. 13, 1909 nunc pro tunc as of July 23, 1909. John L. Gay, clerk of the court, by C. A. Davidson, Deputy. Returned Aug. 17-09. F. H. Dexter, Attorney and Counsellor at Law, San Juan, Porto Rico. W. I.

Endorsed on cover: File No. 21,863. Porto Rico D. C. U. S. Term No. 146. Alcides Aran and Francis H. Dexter, plaintiffs in error, vs. Camilo Zurriñach. Filed October 12th, 1909. File No. 21,863.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 146.

ALCIDES ARAN AND FRANCIS H. DEXTER,
PLAINTIFFS IN ERROR,

vs.

CAMILO ZURRINACH.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

Jurisdiction.

The first question which may present itself to the court, or which may be presented by defendant in error, will be the jurisdiction of this court to consider and determine the writ of error herein.

Before entering upon a description of the merits of this case plaintiffs in error submit that this court has jurisdiction of the writ of error

herein because of the failure of the court below to regard and take into consideration the act of Congress of June 30, 1879 (21 Statutes at Large, page 43), which regulates the manner in which jurors shall be drawn and summoned for the trial of cases in Federal courts.

The judgment in this case against plaintiffs in error was for the sum of $1,565.72.

The writ of error herein is prosecuted to this court upon the ground that there is brought into question the said act of Congress and the denial of the right claimed by plaintiffs in error thereunder.

> (Section 35, act of Congress approved April 12, 1900, entitled "An Act Temporarily to Provide Revenues for Porto Rico and for Other Purposes.")

It is apparent from the transcript of record in this case that plaintiffs in error duly filed in the court below their motion to quash the panel of the jury for the reasons set forth therein, which said motion appears upon page 6 of the transcript of record.

No counter-affidavit or evidence was offered by defendant in error (plaintiff in the court below) to controvert the allegations contained in said motion of plaintiffs in error.

Therefore the allegations of the said motion to quash stand admitted.

These allegations incontrovertibly establish that the jury which tried this cause was not selected in accordance with the act of Congress above referred to.

For this reason the jurisdiction of this court is invoked, notwithstanding that the judgment rendered is less than the sum of $5,000.

If this court considers that plaintiffs in error have been denied a right to which they were entitled under the said act of Congress, namely, in having a jury drawn and summoned in accordance with the provisions thereof, then this cause must be remanded for a new trial before a properly constituted jury.

Assuming that this court had jurisdiction of the writ of error in this case, it is invited to consider what the plaintiffs in error regard as the arbitrary action of the court below in the process of trial.

From the record in this case it appears that plaintiff in error Alcides Aran was a receiver of certain properties in Porto Rico, appointed by the District Court of the United States therein in the case of Will *vs.* Tornabells, and that defendant in error, Camilo Zurriñach, was a creditor having a claim against such receiver.

It further appears that in the month of November, 1907, plaintiff in error Alcides Aran, having terminated his receivership, executed in favor of defendant in error the bond sued upon, which is the basis of this action and which appears in the

complaint (pages 1 and 2 of the transcript of record). This bond was signed by plaintiff in error Francis H. Dexter as guarantor. It provided that the plaintiff in error Alcides Aran should pay all the taxes due and unpaid on one of the properties which was the object of the receivership, to wit, the property called "Veremos." It further provided that plaintiff in error Alcides Aran should deliver to defendant in error the coffee product of the estates called "Collera" and "Porvenir" until defendant in error, Camilo Zurriñach, should be fully paid for the sum which appeared in the report of said receiver, plaintiff in error Aran, as being due and owing to him.

This sum, according to the complaint herein filed, amounted to $1,565.72.

To the said complaint the plaintiff in error Francis H. Dexter filed his separate demurrer (see page 4, printed transcript of record). This demurrer was overruled by the court below, and after the filing of an answer (page 6, transcript of the record) the cause came on for trial.

Before the jury was empaneled plaintiffs in error filed their motion to quash the panel of said jury.

This motion having been overruled, the court proceeded to a trial, and upon the conclusion thereof the court peremptorily and arbitrarily (as plaintiffs in error consider) instructed the jury to find for the plaintiff (defendant in error).

Upon a judgment being entered upon the ver-

dict so found by the jury for the sum of $1,565.72, plaintiffs in error duly prosecuted their writ of error to this court and filed the following assignment of errors:

Assignment of Errors.

"Defendants in the above-entitled cause Alcides Aran and Francis H. Dexter assign as errors committed by the court in the trial of the above-entitled cause the following:

"First. The court erred in usurping the functions of the jury and deciding questions of both law and fact involved in this case upon the opening of the case without hearing any testimony whatsoever.

"2nd. The court erred in refusing to permit defendants to show by competent evidence the impossibility of performance of the bond sued on, to wit, the delivery of the coffee from the properties mentioned in said bond.

"3rd. The court erred in improperly construing the law and charging the jury that defendants were absolutely bound to pay the amount sued on to plaintiff regardless of the condition in the bond to deliver the coffee as stated therein.

"4th. The court erred in peremptorily directing the jury to return a verdict for the plaintiff.

"5th. The court erred in making remarks to the jury to the effect that defendants had no defense to the action.

"The court erred in arbitrarily refusing defendants an opportunity to offer evidence in support of their motion to quash the panel of the jury and in overruling said motion

"6th. The court erred in striking out the testimony of competent witnesses showing that plaintiff had accepted the obligation and agreement of the witness to deliver coffee in the place and stead of said defendant Aran.

"7th. The court erred in striking out the testimony offered by defendants showing the suits of Francisca Aran in her endeavors to retain the properties 'Collera' and 'Porvenir' as against certain mortgage creditors who sought to foreclose mortgages thereon, together with the decrees of this court against the contention of the said Francisca Aran.

"8th. The court erred in striking out the evidence of the mortgage foreclosure proceedings carried on in the District Court of Mayaguez by the mortgage creditors Banco Soller and the American Trading Company and the decrees of said court foreclosing the said mortgages on the estates 'Collera' and 'Porvenir.'

"9th. Because the court erred in denying to defendants the right to have a proper jury as provided by the acts of Congress and particularly Statutes at Large, volume 21, page 43, and in preventing them from showing that the jury box from which the jury was drawn does not contain the names of three hundred qualified jurors and that their names were not placed therein or drawn regularly as required by said law.

"Wherefore these defendants pray that the said judgment be reversed."

ARGUMENT.

Point No. 1.

The court erred in overruling the motion to quash the panel of the jury.

According to the allegations of the motion to quash, which were not controverted either by affidavit or evidence, it appears:

(*a*) That the panel of the jury summoned to try this cause was not drawn from a box containing the names of three hundred qualified jurors.

(*b*) The said panel was not drawn and the names of jurors constituting the same were not placed in the box in the manner required by the act of Congress of June 30, 1879 (21 Statutes at Large, page 43), because it appeared that the court and the jury commissioner of the court did not have the qualifications provided for by the said act.

> "The requirements of this act that the jurors shall be publicly drawn from a box containing at the time of the drawing of the names of not less than three hundred persons are *mandatory*, and any substantial departure from these requirements will invalidate subsequent proceedings if objection is seasonably made."
>
> (U. S. *vs.* Green, Federal Reporter, 816.)

> "The duty to be performed by the clerk of the court and the jury commissioner is mandatory."
>
> (U. S. *vs.* Chaires, 40 Federal Reporter, 820.)

It may be argued that the requirement of the statute as to the political status of the clerk and the jury commissioner is directory and that in the absence of bad faith in the conduct of said officials their action will be sustained, but in the present case the objection is farther reaching. *It was charged by plaintiffs in error and in effect admitted by the defendant in error that the box from which jurors were drawn did not contain the names of three hundred qualified jurors.*

Point No. 2.

The court erred in overruling the separate demurrer of defendant Francis H. Dexter.

The said demurrer was as follows:

> "(1) The said complaint and alleged contract set forth therein did not constitute a cause of action against this defendant.
>
> "(2) The said complaint and contract fails to set forth any consideration for the alleged guarantee of this condition.
>
> "(3) The said complaint fails to show that plaintiff has exhausted his remedies by judgment and execution against the defendant, the principal debtor, before proceeding against this defendant as guarantor.
>
> "(4) Because the said complaint proceeds as upon a liquidated liability whereas if any

> liability in fact and law exists upon the part of this defendant it is only to such extent and for such amount as plaintiff has been damaged, and the complaint fails to set forth the extent to which plaintiff has been damaged on account of failure to receive the coffee and the non-payment of taxes respectively."

For the purposes of this point plaintiff in error Francis H. Dexter respectfully submits to the court that the third ground of the demurrer was in itself sufficient to preclude a recovery against him as prayed for in the complaint.

According to the law of Porto Rico there is no distinction made between suretyship and guarantyship. The "fiador" of the Spanish law has been translated in the English edition of the Civil Code of Porto Rico as "surety," but the employment of this word does not involve and carry with it the technical distinction recognized in American and English law between sureties and guarantors.

Section 1731 of the Civil Code of Porto Rico provides:

> "The surety cannot be compelled to pay a creditor until application has been previously made of all the property of the debtor."

The requirement and theory of the Spanish law in Porto Rico are that the person in whose favor a bond is executed must exhaust all his remedies against the principal in the bond before proceeding against the guarantor or surety.

This doctrine has been sustained by the Supreme Court of Madrid in its various decisions, among others those of April 20, 1886; May 29, 1897, and March 2, 1901.

Sanchez Román, in volume IV of his Commentaries of the Civil Law, states:

> "The contract of guarantee (fianza) being subsidiary and deferred since the guarantor only obligates himself in case of nonpayment by the debtor, whom he has guaranteed, the right of the obligee to sue the guarantor does not arise nor can it be legally recognized until after having exhausted his remedies against the probable debtor, or until the latter has been declared in total or partial insolvency."

On the other hand there must be taken into consideration the provisions of section 1104 of the Civil Code of Porto Rico, which provides:

> "The concurrence of two or more creditors or of two or more debtors in a single application does not imply that each one of the former has the right to ask, nor that each one of the latter is bound to comply in full with the things which are the object of the same. This shall only take place when the application determines it expressly, being constituted as a joint obligation."

Section 1105:

> "If from the (part) of the application referred to in the preceding section any other thing does not appear, the credit or the debt shall be presumed as divided in as many

> equal parts as there are creditors or debtors, being considered as credits or debts, each one different from the other."

It is apparent from the bond sued upon in this case that it is not a joint obligation within the meaning of the Code.

Therefore, in no case could a judgment be rendered against plaintiff in error Dexter for the full amount thereof.

Point No. 3.

The conduct of the court below during the trial was arbitrary, oppressive, and illegal.

Under this point may be considered the 1st, 2d, 3d, 4th, 5th, 6th, 7th, and 8th assignments of error.

The examination of the evidence as contained in the bill of exceptions will disclose that shortly after the execution of the bond sued upon plaintiff in error Aran was deprived of the possession of the properties referred to therein by reason of certain foreclosure proceedings carried on in the District Court of Mayaguez.

The conditions of the bond were:

(1) That he would pay the taxes upon the properties referred to, and

(2) That he would deliver to defendant in error "The coffee product of the Collera and Porvenir plantations until Mr. Zurriñach is fully paid for the sum now appearing in Aran's report and now owing to Zurriñach."

It is conclusively demonstrated by the evidence that without fault upon his part plaintiff in error Aran was prevented from complying with these conditions.

In the first place, the nonpayment of the taxes by plaintiff in error Aran upon the properties referred to in the bond did not and could not prejudice defendant in error, because if such properties were sold under certain mortgage foreclosure proceedings defendant in error had no interest in the same which could be subjected to the payment of his debt.

In the second place, the condition of bond for the delivery of coffee was not an absolute condition for the payment of any sum of money.

The condition was to deliver coffee from the plantations "Collera" and "Porvenir."

This condition was made impossible of compliance with by the subsequent foreclosure, which clearly appeared in evidence.

It must appear to this court that the conduct of the trial court was arbitrary and oppressive to the point of indicating passion and prejudice against plaintiff in error Dexter.

Plaintiff in error Dexter respectfully submits that the judgment of the court below should be reversed.

Respectfully submitted,

FRANCIS H. DEXTER,
For Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 146.

ALCIDES ARAN AND FRANCIS H. DEXTER, PLAINTIFFS IN ERROR,

vs.

CAMILE ZURRIÑACH.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

A suit at law was brought in the District Court of the United States for Porto Rico by defendant in error (hereinafter called the plaintiff) against the plaintiffs in error (hereinafter called the defendants) upon a certain written agreement whereby defendant Aran bound himself to do certain things and defendant Dexter "guaranteed the full compliance" of Aran (Printed Record, p. 2).

Defendants filed a joint answer (p. 6) in which they admitted the execution of the contract declared on but denied all the other allegations of the complaint and set up two

special defenses, which are not involved in this writ of error.

The term of court at which the case was tried opened on the 12th day of July, 1909, and on the 19th day of July, when the case was called for trial, filed their motion to quash the panel of the jury upon two grounds (p. 7), which need not here be dwelt upon but which are claimed to raise a "Federal question" which gives appellate jurisdiction to this court. The motion to quash was overruled, and the trial thereupon proceeded before a jury and resulted in a verdict for plaintiffs in the sum of $1,565.72, upon which judgment was entered (p. 8).

A writ of error to reverse this judgment was applied for to the judge of the trial court upon the theory that the motion to quash the panel of jurors involved the Federal law regulating the preparation of the box from which it had been drawn, and was allowed by that judge (p. 10) upon the theory that any pretext of a Federal question was sufficient to deprive him of discretion as to such allowance.

Nine errors are assigned (p. 12), but only the ninth has any reference whatever to the alleged Federal question. That one reads as follows:

> "Because the court erred in denying to defendants the right to have a proper jury as provided by the acts of Congress and particularly Statutes at Large, volume 21, page 43, and in preventing them from showing that the jury box from which the jury was drawn does not contain the names of three hundred qualified jurors and that their names were not placed therein or drawn regularly as required by said law."

ARGUMENT.

In view of the fact above stated, that no error assigned except the ninth even pretends to assert a right depending upon or in any way involving Federal law, it is unnecessary to make any reference to the others—at least until it is affirmatively determined that said ninth assignment does involve something which really confers jurisdiction on this court to review the case. As the judgment was less than $5,000, the jurisdiction of this court must depend upon the presence of a Federal question which is both material and not frivolous.

Royal Ins. Co. *vs.* Martin, 192 U. S., 149.
American R. Co. *vs.* Castro, 204 U. S., 453.
Kent *vs.* People of P. R., 207 U. S., 113.

In the case last cited it was said by the present chief justice that, where jurisdiction was claimed because of the presence of a Federal question, it was necessary first to consider "the alleged existence of Federal contentions"; and the reason therefore was stated as follows:

> "We do this because, if it be that there are no such questions, it will become unnecessary further to notice the argument (which was, that other questions also would be open). In determining whether assignments of error present Federal questions it is to be borne in mind that the mere fact that some of the assignments relied on assert Federal rights is not determinative, since, even although the assignments formally involve such rights, we are nevertheless without jurisdiction 'where it indubitably appears that the Federal right asserted is frivolous; that is, without color of merit.' American R. Co. *vs.* Castro, 204 U. S., 453."

Pursuing in the case now at bar the same method, we turn our attention to the ninth assignment of error (above quoted) and we find it involves the legality of the jury as constituted by the court in the trial of the case. But, looking further, we also find that the constitution of the jury, however irregular or illegal, was wholly without influence upon the result, as a peremptory instruction was given it to find for the plaintiff (p. 25).

In other words, the court held that under the testimony there was nothing left for the jury to decide—it must merely register a decision made for it by the court; hence whether the jury was composed of eligibles or ineligibles became an immaterial matter, wherein error committed could not lead to a reversal of the judgment.

Whether this action of the court, in determining that upon the evidence no other verdict than one for plaintiff was warranted, was or not erroneous involves no Federal question—and, where the actual decision of the case turns upon a non-federal ground, the judgment cannot be reviewed here because a question, Federal in its nature, may also have been decided in the course of the trial.

Com'l Bank *vs.* Buckingham, 5 How., 317.
Hale *vs.* Akers, 132 U. S., 554, 564.
Cal. Powder Wks. *vs.* Davis, 151 U. S., 389.
Leathe *vs.* Thomas, 207 U. S., 93, 99.
Ark. S. R. Co. *vs.* German Bank, 207 U. S., 270, 275.

These consequences appear so clearly from the record and are so simply reached that, we submit, not only should the judgment below be affirmed, or the writ of error be dismissed, but the plaintiffs in error should also be adjudged to pay the 10 per cent damages provided for by paragraph 2 of rule 23 of this court, upon the ground that their contentions regarding the presence of a Federal question are so

frivolous that the writ must be considered to have been taken for delay only.

Amory *vs.* Amory, 91 U. S., 356.
Wilson *vs.* Everett, 139 U. S., 616.
Gregory, etc., Co. *vs.* Starr, 141 U. S., 222.
Texas & P. R. Co. *vs.* Volk, 151 U. S., 73.
Nelson *vs.* Flint, 166 U. S., 276.

As the collection of the judgment has been suspended and delayed by a supersedeas granted below, we ask the court to impose the penalty as was done in the above cases.

Respectfully submitted,

FREDERICK L. CORNWELL,
N. B. K. PETTINGILL,
Attorneys for Defendant in Error.